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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

GEORGE W. SUMNER, Warden,
San Quentin Prison,

Petitioner,

v.

ANTHONY PAUL MAXWELL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I

Does federal habeas corpus jurisdiction lie for review of a state court's ruling where, without justification, a state prisoner fails to contest the ruling on direct appeal to the state's highest tribunal and his subsequent petition for habeas corpus relief in that court is denied based on his failure to have raised the issue on direct appeal?

II

May a federal court, consistent with principles of comity, disregard a state court's factual determinations, reweigh the evidence presented to the state court and make contrary findings, where the federal court's findings are based solely on a review of state court transcripts?

III

Should a state conviction obtained prior to the decision in Faretta v. California (1975) 422 U.S. 806, be overturned on federal habeas corpus based on retroactive application of the right of self-representation as defined in Faretta v. California?

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OPINIONS BELOW

The opinion of the Court of Appeals is set forth as Appendix A to this petition and is reported as Maxwell v. Sumner (9th Cir. 1982) 673 F.2d 1031. The unreported opinion of the District Court for the Central District of California appears as Appendix B to this petition.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on February 25, 1982. A timely petition for rehearing and for rehearing en banc was denied on April 21, 1982, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 United States Code section 1254(1).

* * * *

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

United States Constitution, Amendment XIV, in relevant part:

"SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive

any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTES INVOLVED

28 United States Code, section 2254, in relevant part:

"(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit --

"(1) that the merits of the factual dispute were not resolved in the State court hearing;

"(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

"(3) that the material facts were not adequately developed at the State court hearing;

"(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

"(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

"(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

"(7) that the applicant was otherwise denied due process of law in the State court proceeding;

"(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of

the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

"And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determation has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous."

Rule 52(a), Federal Rules of Civil Procedure, in relevant part:

". . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witness. . . ."

California Penal Code section 211:

"Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accompanied by means of force or fear."

California Penal Code section 245, in relevant part:

"(b) Every person who commits an assault with a deadly weapon or instrument or by any means likely to produce great bodily injury upon the person of a peace officer or fireman, and who knows or reasonably should know that such victim is a peace officer or fireman engaged in the performance of his duties, when such peace officer or fireman is engaged in the performance of his duties shall be punished by imprisonment in the state prison . . . ."

* * * *

Rule 28, California Rules of Court, in relevant part:

"Hearing in Supreme Court

". . . .

"(d)

". . . .

"(2) Each copy of the petition shall contain or be accompanied by a copy of the opinion of the Court of Appeal, showing the date of its filing.

"(3) The petition shall be a single document including a brief in support of the request for hearing. All contentions in support of the petition shall be included therein, including all legal authorities and argument. If a party files an answer to the petition, it shall be a single document which includes all of his contentions in opposition to the petition. No authorities or argument may be incorporated by reference from another document into the petition, or into the answer, except that the petition or answer may incorporate by reference specified portions of a petition for hearing or answer filed in the Supreme Court by another party

in the same case, or filed in the Supreme Court in a connected case wherein a petition for hearing is also pending. No discussion of authorities or argument, however denominated, may be annexed to or filed with the petition or answer, except where such annexed material is page - numbered consecutively with the body of the petition or answer and the total length, including the annexed material, does not exceed the limit established in paragraph (4)."

STATEMENT OF THE CASE

Respondent was charged in an information filed by the District Attorney of Los Angeles County, California, with two counts of robbery, in violation of California Penal Code section 211, and with two counts of assault with a deadly weapon on a peace officer, in violation of California Penal Code section 245(b). (C.T. pp. 1-5.)[1/]

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1. "C.T." refers to the clerk's transcript prepared by the state trial court for respondent's state appeal. As hereinafter used, "R.T." refers to the reporter's transcript of proceedings in

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Respondent's pretrial motions to relieve his court-appointed attorney and motion to proceed in propria persona were denied. The state trial court found that respondent's motions, made on the day of trial, were untimely and made for the purpose of delay, and further found that respondent's conduct in interrupting the trial court supported a conclusion that respondent could not properly act as his own counsel. (C.T. p. 29; R.T. pp. 48-62.)

On July 30, 1975, following a conviction by a jury on all counts, respondent was sentenced to state prison for the term prescribed by law. (C.T. p. 99.) Respondent took an appeal to the California Court of Appeal, Second

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the state trial court, and "C.R." refers to the clerk's record before the United States Court of Appeals for the Ninth Circuit. Pursuant to the rules of that Circuit, each document in the record was identified by a number and paginated separately. The records of the state court proceedings were lodged with the district court in connection with respondent's petition for writ of habeas corpus.

Appellate District, Division Five. He alleged, inter alia, that his motion to proceed in propria persona should have been granted by the trial court. The California Court of Appeal affirmed the judgment. Thereafter, respondent petitioned the California Supreme Court for hearing on direct appeal, raising several issues but not raising the self-representation issue. The California Supreme Court denied hearing, and the state court judgment became final.[2/]

On August 8, 1977, respondent petitioned the California Supreme Court for a writ of habeas corpus, raising the self-representation issue. On October 6, 1977, that Court denied the petition, citing In re Waltreus, 62 Cal.2d 218, 397 P.2d 1001, 42 Cal.Rptr. 9, cert. denied, 382 U.S. 853 (1965). (C.R. "4," p. 12.)

Thereafter, respondent filed a petition for writ of habeas corpus in the

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2. The opinion of the California Court of Appeal, as well as respondent's appellate brief and petition for hearing in the California Supreme Court, were lodged with the United States District Court. (C.R. "5," p. 1.)

United States District Court for the Central District of California, and a conditional writ issued on May 14, 1979. (C.R. "52," pp. 1-2.) On July 10, 1980, on appeal to the United States Court of Appeals for the Ninth Circuit, the district court was reversed for failure to conduct a de novo review of the record following objections to the magistrate's report and recommendation. (U.S.D.C., 9th Cir. No. 79-2600; Appen. B, p. 18.) Upon remand to the district court, a de novo evidentiary hearing was ordered; however, respondent elected not to present additional evidence. On April 29, 1981, the district court entered an order conditionally granting the petition for writ of habeas corpus. (C.R. "90," pp. 1-2.)

Petitioner filed a timely notice of appeal and, on February 25, 1982, the Court of Appeals affirmed the judgment of the district court. On April 21, 1982, the Court of Appeals amended its opinion and denied petitioner's petition for rehearing and for rehearing en banc. (Maxwell v. Sumner (9th Cir. 1982) 673 F.2d 1031; Appen. A.) On May 11, 1982, the Court of Appeals granted petitioner's

motion for stay of the mandate pending timely filing of a Petition for Writ of Certiorari in this Court.

REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

I

RESPONDENT'S FAILURE TO RAISE THE QUESTION OF SELF-REPRESENTATION IN HIS PETITION FOR HEARING TO THE CALIFORNIA SUPREME COURT CONSTITUTES A WAIVER BARRING FEDERAL HABEAS CORPUS RELIEF

Respondent was tried and convicted by a jury of two counts of robbery, in violation of California Penal Code section 211, and two counts of assault with a deadly weapon on a peace officer, in violation of California Penal Code section 245(b). (C.T. pp. 88-89.) The judgment was affirmed by the California Court of Appeal. Thereafter, respondent sought a hearing in the California Supreme Court, but did not raise the self-representation issue later raised in the federal courts. Hearing was denied and the judgment became final. On August 8, 1977, more than two years after his conviction, respondent petitioned the California Supreme Court for a writ of

habeas corpus raising the self-representation issue for the first time in that court. The petition was denied. (C.R. "4," p. 12; see also, discussion in Maxwell v. Sumner (9th Cir. 1982) 673 F.2d 1031, 1033.)

Petitioner submits that notwithstanding respondent's attempt to exhaust his state court remedies by raising his claim in a collateral attack on a final judgment, his failure to perfect his claim on direct appeal, as required by state rules of procedure, constitutes a waiver of the claim, barring federal habeas corpus relief.

A. Respondent Failed to Perfect his Claim in Accordance With California State Procedures

In the opinion below, the Court of Appeals acknowledged the well-established rule that federal habeas corpus review is barred where a state court's denial of a claim rests on a procedural default, not on the merits of the claim. (Maxwell v. Sumner, supra, at pp. 1033-1034.) As the Court stated: "For reasons of comity and respect for the function of procedural rules in our judicial system, courts view the failure to present a

federal claim in accordance with certain state procedural rules to be an independent and adequate ground for a state court judgment." (Id., at p. 1034.) Thus, respondent's claim is not reviewable in the federal courts unless he had complied with California procedure in presenting a claim for review on the merits to the California Supreme Court and unless that court had rejected respondent's claim on the merits.

Having correctly stated the rule, the Court of Appeals incorrectly concluded that the California Supreme Court had considered and rejected respondent's claim on the merits. This conclusion is contrary to the conclusions of the district court judgment that the Court of Appeals purported to affirm. (Appen. B, pp. 19-22.) The Court of Appeals noted that when the California Supreme Court had denied respondent's petition for habeas corpus relief, it cited In re Waltreus, 62 Cal.2d 218, 397 P.2d 1001, 42 Cal.Rptr. 9, cert. denied, 382 U.S. 853, (1965), a case where a petition for a writ of habeas corpus was denied after the claim had been considered and rejected on direct appeal. The Court of Appeals concluded that the

citation to Waltreus implied that the California Supreme Court had considered and rejected respondent's claim on direct appeal by somehow acknowledging that the state Court of Appeal had considered the claim. (Maxwell v. Sumner, supra, at pp. 1034-1035.) Although as heretofore noted, respondsnt had failed to raise the instant claim in the body of his petition for hearing presented to the California Supreme Court on direct appeal, the Court of Appeals reasoned that the California Supreme Court must have passed upon that claim since the claim was discussed in the state Court of Appeal opinion which was attached as an appendix to the petition for hearing in the California Supreme Court. (Id., at p. 1034, fn. 1.)

The Court of Appeals' interpretation of the California proceedings is incorrect and imposes an unreasonable burden on the state courts. On direct appeal, unless a petition for hearing is granted, the California Supreme Court does not consider any issue not raised within the body of the petition. Although a petition for hearing to the California Supreme Court must contain, as an appendix, a copy of any intermediate

appellate court opinion (rule 28(d)(2), Cal. Rules of Court), inclusion of that appendix does not automatically raise any issues discussed in the intermediate appellate opinion. "The petition shall be a single document including a brief in support of the request for hearing. All contentions in support of the petition shall be included therein, including all legal authorities and argument. . . ." (Rule 28(d)(3), Cal. Rules of Court.) The Court of Appeals' conclusion that respondent's claim was considered on the merits by the California Supreme Court would be correct only if the California Supreme Court had granted a hearing on direct appeal. When a hearing is granted, any intermediate appellate decision is ordered vacated and the case is placed in the same procedural posture as it was when a notice of appeal was filed in the trial court. (See Menchaca v. Helms Bakeries, Inc., 68 Cal.2d 535, 541, fn. 1, 439 P.2d 903, 907, fn. 1; 67 Cal.Rptr. 775, 779, fn. 1 (1968).) Thus, when hearing is granted by the California Supreme Court, any issue preserved for appeal in the trial court may be briefed, argued and decided. However, when the California

Supreme Court denies a petition for hearing, it passes only upon the issues raised in the brief in support of the petition, and does not otherwise rule on matters discussed within the state Court of Appeal opinion. (See rule 28, Cal. Rules of Court.)

Heretofore, federal courts have honored this California rule. In Garrison v. McCarthy (9th Cir. 1981) 653 F.2d 374, the Court of Appeals expressly ruled that where an issue is raised on direct appeal to the California Court of Appeal but is not among issues raised in a subsequent petition for hearing to the California Supreme Court, there is a failure to exhaust state court remedies. (Id., at p. 376; see also Gonzales v. Stone (9th Cir. 1976) 546 F.2d 807, 808, fn. 2.)

If the California Supreme Court was barred by its own rules of procedure from considering, on direct appeal, a claim not raised in the brief in support of respondent's petition for hearing, it follows that the citation to In re Waltreus, supra, in the order denying habeas corpus relief to respondent could not have been the California Supreme Court's shorthand for saying that

respondent's claim had been rejected on the merits. Indeed, the line of California decisions of which In re Waltreus is a part stands for the proposition that habeas corpus may not function either as a second appeal or as a substitute for appeal. A petitioner waives an issue which could have been raised on direct appeal where it is not so raised. (See In re Terry, 4 Cal.3d 911, 927; 484 P.2d 1375, 1387; 95 Cal.Rptr. 31, 43 (1971); In re Streeter, 61 Cal.2d 47, 52; 423 P.2d 976, 979; 56 Cal.Rptr. 824, 827 (1967); In re Shipp, 62 Cal.2d 547, 552; 399 P.2d 571, 575; 43 Cal.Rptr. 3, 7 (1965); In re Winchester, 53 Cal.2d 528, 532; 348 P.2d 904, 907; 2 Cal.Rptr. 296, 299 (1960); In re Dixon, 41 Cal.2d 756, 759; 264 P.2d 513, 514-515 (1953); In re Byrnes, 26 Cal.2d 824, 827; 161 P.2d 376, 377 (1945).) The federal rule is similar to California's. (See, e.g., United States v. Addonizio (1979) 442 U.S. 178, 184-185.)

The Court of Appeals' conclusion that respondent's claim was rejected on the merits is not supported by California authority and cannot be reconciled with the Court of Appeals' own decision in

Garrison v. McCarthy, supra. This misinterpretation of state procedure strikes at the very heart of the doctrine of comity by presuming to tell a state court that it has considered an issue that it has not considered and could not consider according to its own rules of procedure. In so doing, the Court of Appeals has impermissibly broadened the remedy of federal habeas corpus by finding that a state prisoner has exhausted his state court remedies even where the prisoner has not complied with state procedures necessary to preserve his claim.

B. Respondent's Failure to Perfect his Claim in Accordance with California Procedural Rules Bars Federal Habeas Corpus Relief

As a matter of comity, federal courts will not grant a state prisoner habeas corpus relief unless the prisoner exhausts state court remedies. (28 U.S.C. § 2254(b).) State court remedies are not exhausted unless all claims have been fairly presented to the state courts (Rose v. Lundy (1982) ___ U.S. ___, 102 S.Ct. 1198, 1199-1205; Picard v. Connor (1971) 404 U.S. 270, 275), and the state's highest tribunal has disposed of the claim on the merits (see Harris v. Superior

Court (9th Cir. 1974) 500 F.2d 1124, 1128 (en banc), cert. denied, 420 U.S. 973 (1975)).

This Court has placed great importance on the concept of finality of judgment in state court proceedings, and has repeatedly limited the ability of federal courts to interfere freely with final state court judgments absent a demonstration of cause or showing of actual prejudice. (Engle v. Isaac (1982) ___ U.S. ___, 102 S.Ct. 1558; Francis v. Henderson (1976) 425 U.S. 536, 542.) In so doing, this Court has established a body of law outlining the concept of waiver resulting in a forfeiture of the right to seek federal habeas corpus relief. In Estelle v. Williams (1976) 425 U.S. 501, this Court held that trial counsel's failure to object to a trial of a state defendant while in jail clothes was a bar to later seeking federal habeas corpus relief. (Id., at pp. 509-513.) In Francis v. Henderson, supra, this Court held that failure to make a timely challenge to the composition of a state grand jury waived federal habeas corpus relief absent a showing of actual prejudice. (Id., at p. 542.) In

Wainwright v. Sykes (1977) 433 U.S. 72, this Court held that federal habeas corpus relief was barred by the failure of a state defendant to comply with a state contemporaneous objection rule relating to objections under the rule of Miranda v. Arizona (1966) 384 U.S. 436. (433 U.S. at pp. 86-87.) This Court further held that once a waiver is shown, a federal habeas corpus petitioner may seek relief only if he can demonstrate both cause and prejudice attendant to the state procedural waiver. (Id., at pp. 87, 90-91.)

In the recent case of Engle v. Isaac, supra, ____ U.S. ___, 102 S.Ct. 1558, this Court considered the holding of Wainwright v. Sykes, supra, in the context of a federal habeas corpus action brought by a state defendant who had failed to comply with a state rule mandating contemporaneous objections to jury instructions. This Court strongly reaffirmed the principle that when a procedural default bars state litigation of a constitutional claim, a state defendant may not obtain federal habeas corpus relief absent a showing of both cause for the default and actual prejudice. (Id., at pp. 1570-1572.) Clearly, principles of comity

warrant applying the Sykes rule whether the procedural default occurred at trial or on appeal in the state courts.

Circuit courts have repeatedly applied this Court's reasoning in cases where the waiver occurred because a claim was not raised as required by state procedural rules. In Forman v. Smith (2d Cir. 1980) 633 F.2d 634, a state prisoner sought federal habeas corpus relief for an alleged violation of his Sixth Amendment rights, although he had not raised the issue on direct appeal in the state courts and the state's highest court had found the issue to be barred for lack of proper procedural presentation. (Id., at pp. 635-636.) In reversing an order granting a writ of habeas corpus, the Court of Appeals concluded as follows:

> "Our review of the origins of the cause and prejudice standard and the reasons for its application in [Wainwright v.] Sykes to forfeitures of specific claims at trial persuades us that that standard also applies to forfeitures of specific claims on appeal. . . ." (Id., at p. 640.)

Similarly, in Carothers v. Rhay (9th Cir. 1979) 594 F.2d 225, failure to

raise an issue on direct appeal where such a failure is a bar to later collateral attack under state law, constitutes an adequate state procedural ground under the theory of Wainwright v. Sykes, supra, to bar federal review of the merits. (Id., at p. 228.) In Evans v. Maggio (5th Cir. 1977) 557 F.2d 430, the Court of Appeals applied the reasoning of Francis v. Henderson, supra, in requiring that a state defendant show cause for the waiver or actual prejudice as a prerequisite to habeas corpus relief where an issue was not raised on direct appeal in the state courts and failure to so raise the issue barred later habeas corpus relief in the state court. (Id., at pp. 431-434.)

The self-representation claim presented by respondent was identified by respondent as an issue at the time he initiated his appeal to the California Court of Appeal and was subsequently abandoned by respondent when petitioning for hearing in the California Supreme Court. By incorrectly concluding that the issue was decided by the California Supreme Court, the Court of Appeals failed to deal with the district court's analysis that respondent had cause excusing him

from raising the issue in the California Supreme Court. It is submitted that the district court was also in error. The district court reasoned that it would have been futile to raise the self-representation issue in light of a state court holding that Faretta v. California (1975) 422 U.S. 806, was not retroactive. (See People v. McDaniel (1976) 16 Cal.3d 156; Appen. B, pp. 20-22.)

Contrary to the conclusion of the district court, futility does not constitute "cause" for failing to raise an issue in the California Supreme Court, and in any event, the concept does not apply in the instant case. As this Court recently held:

> "If a defendant perceives a constitutional claim and believes it may find favor in the federal courts, he may not bypass the state courts simply because he thinks they will be unsympathetic to the claim." (Engle v. Isaac, supra, at p. 1572.)

Even a later discovery of a constitutional defect unknown at the time of trial does not automatically constitute "cause" for bypassing a state remedy, and the federal courts are precluded from considering

whether a defect rendered the original trial fundamentally unfair where, as here, the record establishes that respondent's claim was known to him at trial. (Id., at pp. 1573-1574.)[3/]

Moreover, in light of the fact that the Ninth Circuit recognized a right of self-representation prior to Faretta v. California, supra (see Bittaker v. Enomoto (9th Cir. 1978) 587 F.2d 400, 401), there is no reasonable basis to conclude that it would have been futile to raise the self-representation issue in the petition for hearing in the California Supreme Court. That Court has never considered the impact of the Ninth Circuit self-representation cases on California law, and the Ninth Circuit has maintained that it need not consider the retroactivity of Faretta v.

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3. This Court recently rejected a Court of Appeals conclusion that cause may be shown by such an unanticipated change in law, and remanded the case for consideration in light of Engle v. Isaac, supra. (Myers v. Washington (1981) 646 F.2d 355, cert. granted and remanded sub. nom. Washington v. Myers (Apr. 19, 1982) ___ U.S. ___, 102 S.Ct. ___.)

California in light of its earlier opinions recognizing a right of self-representation. (See Walker v. Loggins (9th Cir. 1979) 608 F.2d 731, 734; Bittaker v. Enomoto, supra, at p. 401, cert. den. 441 U.S. 913 (1979).)

Assuming, arguendo, that respondent had established cause for failure to properly present his claim in the state courts, federal habeas corpus relief is barred absent a showing of actual prejudice. (Engle v. Isaac, supra, at pp. 1570-1572, 1575; Wainwright v. Sykes, supra, 433 U.S. at p. 91; Francis v. Henderson, supra, 425 U.S. at p. 542; Forman v. Smith, supra, 633 F.2d at p. 642.) The district court held that prejudice is presumed where there is a denial of a request for self-representation. (Appen. B, pp. 25-26.) However, it is well-settled that where a waiver has occurred in the state appellate process, there is no presumption that prejudice resulted from denial of a constitutional right. (Davis v. United States (1973) 411 U.S. 233, 245.) A federal writ of habeas corpus may not issue unless actual prejudice is demonstrated. (See discussion in Forman v. Smith, supra, at

pp. 641-642.) Where, as here, respondent cannot point to any significant harm as a result of his representation by a skilled and experienced lawyer in lieu of himself, there is no evidence of actual prejudice.

Petitioner submits that the exercise of federal habeas corpus jurisdiction to assess the validity of a state criminal conviction is necessarily limited by the doctrine of comity. In an effort to maintain the dignity of both the state and federal court systems within their separate spheres, federal habeas corpus should not lie where a state defendant who has demonstrated neither cause nor prejudice, has bypassed a state remedy available on direct appeal and thus bypassed the only procedure available for the state's highest court to review his claim on the merits. (See Rose v. Lundy, supra, at pp. 1199-1205.)

* * * *

II

THE FEDERAL COURTS BELOW ERRED IN MAKING FINDINGS CONTRARY TO THE STATE TRIAL COURT WHERE THE FINDINGS WERE BASED ONLY ON A REVIEW OF THE STATE TRIAL COURT TRANSCRIPTS

The state trial court denied respondent's motion to proceed in propria persona for two reasons: It found that respondent's motion, made on the day of trial, was untimely and made for the purpose of delay. It also found that respondent's "outlandish conduct" warranted rejection of his request to act as counsel. (R.T. p. 62.) Respondent's first request to represent himself came on the day of trial and had not previously been brought to the attention of the trial court through written or oral motions. (C.T. p. 29; R.T. p. 48.) Additionally, the record reveals that respondent repeatedly interrupted the trial court, and engaged in conduct sufficient to provoke counsel for a codefendant to move for a severance. (R.T. p. 62; C.R. "50," p. 21.) Despite the record, the United States District Court rejected the state court's conclusion and, based solely on a review of state court transcripts, imposed

its own interpretation of the facts over that of the state trial and appellate courts. (Appen. B, pp. 23-25.)

The authority of a federal court to reject factual findings by the state trial and appellate courts is limited by 28 U.S.C. section 2254(d). Under that section, the findings of the state trial court and the state court of appeal that respondent engaged in disruptive conduct on the day of trial, and that the motion for self-representation was intended for delay are presumptively correct. (Sumner v. Mata (1981) 449 U.S. 539.) The District Court rejected these presumptively correct findings on the ground that they were not fairly supported by the record. (C.R. "91," pp. 6-7.) Although section 2254(d) permits such a conclusion where appropriate, it is clear that the District Court failed in the instant case to give the state court's factual findings the proper presumption of correctness. (See discussion in Sumner v. Mata (1982) ___ U.S. ___, 102 S.Ct. 1303.)

A motion for self-representation is timely only if made within a reasonable time prior to the commencement of trial. (United States v. Price (9th Cir. 1973)

474 F.2d 1223, 1325, fn. 2.) The determination of timeliness is a matter peculiarly within the trial court's discretion. (United States v. Lawrence (4th Cir. 1979) 605 F.2d 1321, 1324-1325.) In the instant case, considering the seriousness of the charges the lack of any substantial evidence of inadequate representation, and the joinder of a codefendant for trial, it cannot be said that the state trial court abused its discretion in denying a motion made on the day of trial. Similarly, the District Court erred in giving a different interpretation to the factual record of respondent's conduct in the state trial court. Notably, this interpretation was based solely on a cold reading of the state trial transcripts and not on any independent evidence gathering process in the federal courts. Such a "stenographic transcript correct in every detail fails to reproduce tones of voice and hesitations of speech that often make a sentence mean the reverse of what the words signify. The best and most accurate record is like a dehydrated peach; it has neither the substance nor the flavor of the fruit before it was dried." (Broadcast Music v.

Havana Madrid Restaurant Corp. (2d Cir. 1949) 175 F.2d 77, 80.) In light of the fact that a trial court has authority to deny a self-representation motion where a defendant's disruptive or outlandish behavior justifies the denial (see Faretta v. California, supra, 422 U.S. 806, 834-835, fn. 46), the District Court should have deferred to the state trial court's factual conclusions.

On appeal, the Court of Appeals characterized the District Court as a fact-finding tribunal and declined to overturn the findings of that court unless they were "clearly erroneous." (Maxwell v. Sumner, supra, at p. 1036.) While acknowledging a division in the circuits, the Court of Appeals held that rule 52(a), Federal Rules of Civil Procedure, requires applying the "clearly erroneous" standard to district court findings based solely on state documents. The Court of Appeals reasoned that the district court "is in a better position to judge whether a defendant's behavior was outrageous or his motion for self-representation was made with the intent to delay the trial." (Maxwell v. Sumner, supra, at p. 1036, fn. 5.) Petitioner submits that there is

no justification to apply the federal "clearly erroneous" standard to findings of a district court where the findings are based solely on a review of state transcripts. In such a situation, the District Court does not act as a fact-finding tribunal. Rather, the District Court acts under the "presumption of correctness" standard of review imposed by 28 U.S.C. section 2254(d). (See discussion in Sumner v. Mata, supra (1982) ___ U.S. ___, 102 S.Ct. at pp. 1304-1307.) Where a district court fails to accord state findings a presumption of correctness, the error is compounded if the Court of Appeals thereafter presumes the district court findings to be correct.

The standard employed by the Court of Appeals presumes that the District Court heard testimony since the standard calls for ". . . due regard [to] be given to the opportunity of the trial court to judge the credibility of the witnesses." (Rule 52(a), Fed. Rules Civ. Proc.) However, the District Court had no opportunity to judge the credibility of witnesses since no witnesses were presented. In Taylor v. Lombard (2d Cir. 1979) 606 F.2d 271, 372, cert. den. 445

U.S. 946, it was expressly held that the clearly erroneous standard does not apply to District Court findings based soley on a review of the state record in habeas corpus proceedings. Where a state or federal prisoner launches a collateral attack on a final judgment, society's legitimate interest in the integrity of the judgment renders the approach taken by the Court of Appeals inappropriate. (See, United States v. Frady (1982) ___ U.S.___, 102 S.Ct. 1584, 1592-1593; Henderson v. Kibbe (1977) 431 U.S. 145, 154.) Considering the principles of comity underlying the statutory presumption that state court findings are correct (see Sumner v. Mota, supra, 449 U.S. at pp. 545-552; Younger v. Harris (1971) 401 U.S. 37, 53), the Court of Appeals erred in concluding that the District Court is in the better position to judge respondent's conduct.

* * * *

III

THE DECISION OF THE COURT OF APPEALS IMPERMISSIBLY APPLIES THE ABSOLUTE RIGHT OF SELF-REPRESENTATION RETROACTIVELY TO A TRIAL COMMENCING PRIOR TO THIS COURT'S DECISION IN FARETTA V. CALIFORNIA

In the opinion below, the Court of Appeals ostensibly applied its own decisional law in finding that respondent had a right to proceed in propria persona. (Maxwell v. Sumner, supra, at p. 1035.) However, the Court neglected to deal with the contention that denial of respondent's request was consistent with prior Ninth Circuit law which did not include an absolute right to self-representation. (See United States v. Dujanovic (9th Cir. 1973) 486 F.2d 182, 186.) The Court of Appeals in effect characterizes the Ninth Circuit right to self-representation as absolute. This holding is in conflict with Ninth Circuit decisional law and thus has the effect of retroactively applying the rule of Faretta v. California, supra (1975) 422 U.S. 806, as if it had previously been the rule in the Ninth Circuit.

There is a strong split of authority in both state and federal courts

on whether Faretta v. California should be applied retroactively. (Compare Martin v. Wyrick (8th Cir. 1978) 568 F.2d 583, 587; People v. McDaniel, supra, 16 Cal.3d 156, 545 P.2d 843, 127 Cal.Rptr. 467, cert. denied 429 U.S. 847 (1976) (holding Faretta not retroactive) with Chapman v. United States (5th Cir. 1977) 553 F.2d 886, 889-890; People v. Holcomb (Mich. 1975) 395 Mich. 326, 235 N.W.2d 343, 347, fn. 7 (applying Faretta retroactively).) Petitioner submits that a writ of certiorari should be granted to enable this Court to define the nature of any right of self-representation that state courts must apply to cases arising prior to the decision in Faretta v. California, supra.

* * * *

CONCLUSION

For the foregoing reasons, petitioner submits that a writ of certiorari should issue to review the decision of the United States Courts of Appeals for the Ninth Circuit.

Respectfully submitted,

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